



[Handwritten signature]

RECEIVED

AUG 26 1993

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

215-17-

In re Applications of)
RAINBOW BROADCASTING COMPANY)
For Extension of Construction Permit)
and for Consent to the Transfer of)
Control of the Permittee of)
Station WRBW(TV), Orlando, Florida)

File Nos. BMPCT-910625KP
and BTCCT-911129KT

DOCKET FILE

TO: The Commission

DOCKET FILE COPY ORIGINAL

DOCKET FILE COPY ORIGINAL

37

CONTINGENT APPLICATION FOR REVIEW

HARRY F. COLE

Bechtel & Cole, Chartered
1901 L Street, N.W.
Suite 250
Washington, D.C. 20036
(202) 833-4190

Counsel for Press Broadcasting Company, Inc.

August 26, 1993

RECEIVED

AUG 26 1993

SUMMARY

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

The action of the Chief, Mass Media Bureau, reinstating the construction permit of Rainbow Broadcasting Company ("Rainbow") for Station WRBW(TV), Orlando, Florida, was completely unsupported in fact and law. To the contrary, it flew in the face of well-established statutory, judicial and administrative authority which had correctly led the Chief, Video Services Division, to deny Rainbow's above-captioned application for extension of its permit, cancel that permit, and dismiss as moot the above-captioned application for consent to the assignment of the permit.

A party seeking an extension of a construction permit must demonstrate either that construction has been completed, or that substantial progress has been made toward completion, or that no progress has been made as a result of circumstances beyond the permittee's control. Here Rainbow made no such showing, because its failure to construct was a completely voluntary decision on the part of Rainbow. Rainbow's suggestions to the contrary in its various applications and related pleadings are flatly contradicted by, *inter alia*, Rainbow's own statements made, under oath, to a District Court in a lawsuit which Rainbow itself initiated.

In his decision, the Chief, Mass Media Bureau, ignored the well-established line of Commission and court decisions setting out the standards for extensions of permits. Without even acknowledging those decisions, much less explaining why they were not absolutely conclusive of the matter, the Chief, Mass Media Bureau, attempted to fashion some alternate policy for which he cited no authority, a policy for which, to the best of Press' knowledge, there is no supporting authority, a policy which to the contrary is completely inconsistent with longstanding precedent which has been recently reaffirmed by the full Commission. The decision of the Chief, Mass Media Bureau, is wholly without legal support.

Additionally, it is without factual support. To the very limited extent that the Chief, Mass

Media Bureau, appears to have addressed any "facts" at all, he chose to ignore demonstrated, unchallenged facts; instead, he self-servingly fabricated some vague "facts" in an effort to support an otherwise unsupportable position.

The Chief, Mass Media Bureau, also erred in refusing to, at a minimum, designate Rainbow's various applications for hearing to explore obvious questions relating to Rainbow's basic qualifications to be a Commission permittee. Rainbow's own contradictory statements to the Commission in its various applications and pleadings demonstrate on their face that Rainbow has lied to the Commission. Over and above this, Rainbow's own statements, under oath, in the civil litigation which Rainbow itself initiated underscore the existence of clear questions concerning misrepresentation, lack of candor, lack of financial qualifications, and abuse of administrative and judicial processes. The Communications Act of 1934, as amended, and the decisions (including a number of recent decisions) of the U.S. Court of Appeals for the D.C. Circuit, preclude any action on applications where such questions remain unresolved.

TABLE OF CONTENTS

SUMMARY	i
QUESTIONS PRESENTED FOR REVIEW	1
FACTORS WHICH WARRANT COMMISSION CONSIDERATION	2
STANDING	2
FACTUAL AND PROCEDURAL BACKGROUND	2
THE BUREAU CHIEF'S DECISION	7
ARGUMENT	9
I. The Bureau Chief's Grant of Rainbow's Extension Application Was Factually and Legally Incorrect.	9
II. The Bureau Chief's Conclusory and Unsupported Refusal to Consider the Substantial and Material Questions Which Exist With Respect to Rainbow's Basic Qualifications Was Inconsistent With Well-Established Statutory and Administrative Standards Which Require the Designation of Those Questions for Hearing.	13
<i>Misrepresentation/Lack of Candor.</i>	14
<i>Financial Qualifications.</i>	15
<i>Abuse of Process.</i>	18
CONCLUSION	19

Pursuant to Section 1.115 of the Commission's Rules, Press Broadcasting Company, Inc. ("Press") hereby submits, on a contingent basis ^{1/}, its Application for Review seeking review, by the full Commission, of the actions of the Chief, Mass Media Bureau ("Bureau Chief"), contained in his letter (Ref. 1800E1-PRG), dated July 30, 1993, concerning the above-captioned applications of Rainbow Broadcasting Company ("Rainbow"). A copy of the Bureau Chief's letter is included as Attachment A hereto. The Bureau Chief's actions are inconsistent with the Commission's rules, with well-established precedent, with the Communications Act of 1934, as amended, and with explicit admonitions of the U.S. Court of Appeals for the D.C. Circuit.

QUESTIONS PRESENTED FOR REVIEW

Did not the Bureau Chief err in reversing the decision of the Chief, Video Services Division ("Division Chief") ^{2/} (which denied the above-captioned application for extension of construction permit) where the Division Chief's action was completely consistent with Commission rules, policies and precedent, where no factual or legal basis at all was demonstrated at any time for granting that application, and where the Bureau Chief's grant of the above-captioned applications is in fact completely contrary to applicable rules, policies and precedent?

Even if, *arguendo*, denial of Rainbow's applications was not warranted, did not the Bureau Chief err in refusing to designate the above-captioned applications for hearing in light of the substantial and material questions which were presented concerning Rainbow's apparent misrepresentations or lack of candor, Rainbow's admitted lack of financial qualifications, and Rainbow's demonstrated abuse of process?

^{1/} As the Commission is aware, on August 13, 1993, Press filed an "Emergency Petition for Immediate Rescission, Setting Aside or Vacation of Action Taken Pursuant to Delegated Authority" ("Emergency Petition"). In its Emergency Petition Press noted that the Bureau Chief's decision which is the subject of this Application for Review appeared to have been tainted by *ex parte* communications in violation of the Commission's own rules and that that decision should thus be immediately rescinded or otherwise nullified. To the best of Press' knowledge no action has yet been taken on its Emergency Petition. Press continues to believe that immediate rescission is the appropriate course for the reasons stated in its Emergency Petition; Press intends to continue to pursue that relief in connection with its Emergency Petition. However, over and above the *ex parte* impropriety which appears to taint the Bureau Chief's decision, that decision in any event lacks any sound factual or legal basis. Accordingly, in order to preserve its right to challenge the Bureau Chief's decision on substantive grounds separate and apart from the *ex parte* basis which Press is independently pursuing, Press is submitting this Application for Review.

Of course, in the event that Press' Emergency Petition is granted (or the Bureau Chief's action is nullified in some other fashion, *e.g.*, by order of a court of competent jurisdiction), Press reserves the right to withdraw this Application for Review pending further action on the underlying applications. Press also reserves the right to seek review of any further action if it, too, lacks factual or legal bases or appears to be tainted in some way.

^{2/} A copy of the Division Chief's action (Ref. 1800E1-PDG), June 18, 1993, is included as Attachment B hereto.

FACTORS WHICH WARRANT COMMISSION CONSIDERATION

Commission consideration of this matter is warranted because the Bureau Chief's action is plainly in conflict with the Communications Act of 1934, as amended, the Commission's rules, regulations and policies, and well-established administrative and judicial precedent.

Moreover, to the limited extent that the Bureau Chief's decision may arguably be said to have included any findings as to important or material questions of facts, the decision is completely contradicted by the available evidence.

STANDING

Press is the licensee of Station WKCF(TV), Clermont, Florida. Station WKCF(TV) serves the general area of the Orlando ADI, including Clermont (the station's community of license) and other communities in the market. Pursuant to Commission approval, Station WKCF(TV)'s antenna is located on the same tower specified in Rainbow's construction permit. As a result, it is beyond argument that Press would compete against Rainbow for audience and revenues (if Rainbow were ever to construct and operate its station), and therefore Press has standing to oppose to Rainbow's application. See, e.g., *FCC v. Sanders Brothers Radio Station*, 309 U.S. 470 (1940).

FACTUAL AND PROCEDURAL BACKGROUND

1. Because the Bureau Chief's decision below fails to provide an adequate description of the background of this long-running case, Press offers the following chronology of relevant events. Rainbow's permit was initially granted in 1984. *Metro Broadcasting, Inc.*, 99 F.C.C.2d 688 (Rev. Bd. 1984). Although fully authorized to construct and operate, Rainbow declined to do so until its grant had become final at the conclusion of all judicial appeals. To that end, it filed no fewer than four applications for extension or reinstatement of its permit during the course of appellate litigation concerning its permit. See File Nos. BPCT-880711KE, BPCT-890510KG, BMPCT-891117KE, BPCT-900702KK. In those applications, the sole basis stated for Rainbow's failure to construct was the fact that its grant was still subject to judicial review. *Id.*

2. On August 30, 1990, Rainbow's grant became final.^{3/} Thus, the justification upon which Rainbow had relied up to that point for non-construction -- *i.e.*, the on-going appellate process -- immediately lost any validity it might have had previously.

3. On January 25, 1991, Rainbow filed its fifth extension/reinstatement application. *See* Attachment C hereto. Since its "on-going appeals" excuse had, since August 30, 1990, evaporated, thus necessitating some other excuse for non-construction, Rainbow stated as follows:

Upon [completion of all appeals], Rainbow engaged engineering services to undertake construction of the station. *Actual construction has been delayed by a dispute with the tower owner* which is the subject of legal action in the United States District Court for the Southern District of Florida (Case No. 90-2554 CIV MARCUS). A Motion for Preliminary Injunction was heard on January 11, 14 and 16, 1991 and is scheduled to conclude on January 23, 1991, with a decision anticipated shortly thereafter.

Rainbow anticipates that its exclusive right to the use of the tower aperture will be recognized by the District Court. *Rainbow is ready, willing and able to proceed with construction upon a ruling from the District Court* and anticipates completion of construction within 24 months of a favorable Court action.

See Attachment C hereto (emphasis added). Press encourages the Commission to review Attachment C hereto in detail to satisfy itself that, in fact, the *SOLE* basis alleged by Rainbow for its failure to construct was the supposed "dispute with [Rainbow's] tower owner".

4. Rainbow's January, 1991 extension application was granted almost immediately, with the new expiration date set at August 5, 1991. On June 25, Rainbow filed a sixth extension application. There, after repeating its boilerplate remarks concerning the length of the appellate process, Rainbow stated:

Upon [completion of all appeals], Rainbow engaged engineering services to undertake construction of the station. *Actual construction has been delayed by a dispute with the tower owner* which is the subject of legal action in the United States District Court for the Southern District of Florida (Case No. 90-2554 CIV MARCUS). A motion for preliminary injunction was denied by the court on June 6, 1991.

Immediately upon denial of the preliminary injunction request, Rainbow notified the

^{3/} Rainbow has specifically acknowledged that finality occurred as of August 30, 1990. *See* Rainbow Petition for Reconsideration (filed July 2, 1993) at Appendix A, page 2 ("08.30.90 Supreme Court denies request for rehearing GRANT NOW FINAL").

tower owner of its intention to commence construction (a copy of the letter to Guy Gannet Tower Co. is appended hereto) and requested that the lease provisions regarding construction bids be effectuated. In addition, Rainbow has initiated discussions with equipment manufacturers regarding construction specifications and intends to place its equipment order as soon as the building construction schedule is finalized.

Rainbow will commence operation prior to December 31, 1992, as it previously informed the Commission.

See Attachment D hereto (emphasis added).

5. Thus, in its fifth and sixth extension applications, Rainbow sought extensions solely on the basis of its claim that a "dispute" with its tower owner had somehow prevented construction.

Further, Rainbow explicitly and expressly stated in its sixth application (filed on June 25, 1991) that it was at that time going forward with construction, that it would place equipment orders in the near future, and that, *without condition or caveat*, it would begin operation "prior to December 31, 1992". ^{4/}

6. As noted above, Rainbow's January, 1991 application was granted quickly -- so quickly that Press was unable to oppose the application before the grant. ^{5/} Press did file a timely, formal petition for reconsideration of the grant, however. In that petition Press pointed out that the "dispute" with the tower owner cited in Rainbow's application was not in any way, shape or form a bar to Rainbow's construction. To the contrary, it was a lawsuit *initiated by Rainbow* and designed solely to prevent Rainbow's tower owner from leasing certain tower space to Press. ^{6/} Far from relying on

^{4/} Although Rainbow's permit was then set to expire in *August, 1991*, Rainbow specified *December 31, 1992* - more than 16 months *after* the expiration date which had been extended five times already -- as the promised date of commencement of operation. While Rainbow has argued that it should be entitled to a full two years following finality of the appellate process, even that generous measure (which is not supported by rule or precedent) would have required completion of construction by August 30, 1992, *i.e.*, two years after its permit became final.

^{5/} Rainbow's January, 1991 extension application was granted on February 5, 1991, the same day that the Commission issued public notice of the filing of that application. See *Broadcast Applications*, Report No. 14919, Mimeo No. 11606, released February 5, 1991 (announcing acceptance for filing of Rainbow's application). In other words, members of the public (such as Press) had no way to oppose that application before it was granted, because the Commission did not advise the public that the application had been filed until the day it was granted.

^{6/} As noted above, the Commission has authorized the co-location of the Rainbow and Press transmitters.

some notion that the tower owner was preventing Rainbow from constructing, Rainbow's allegations in the civil suit demonstrated that there was *absolutely no impediment* to Rainbow's construction whatsoever. Press even quoted the sworn testimony of Rainbow's dominant principal, Joseph Rey, in which Mr. Rey explicitly and expressly admitted that Rainbow *could* construct its facility *at any time*:

Q: Is it your understanding as you sit there right now, if you want to put the antenna up top, that you could put it up at that height on the tower?

Rey: I could put it up at that height, but I have to share it, is what they are telling me.

Rey Dep. Tr. 130 (Attachment E hereto). ^{7/} Press also pointed out a variety of other sworn statements made by Mr. Rey or other Rainbow representatives, all of which raised serious questions concerning Rainbow's financial qualifications and its truthfulness and candor before the Commission.

7. In its opposition to Press' petition for reconsideration, Rainbow declined to explain how it had been precluded in any way from constructing its station up to that point by the "dispute" with its tower owner. ^{8/} While Rainbow continued to assert that its failure to construct was attributable to circumstances "clearly beyond its control", it never even attempted to explain what those circumstances might have been.

8. On June 6, 1991, the Judge in the lawsuit between Rainbow and its tower owner denied Rainbow's request for a preliminary injunction. In so doing, he reached a number of findings and conclusions which corroborated Press' charges against Rainbow. A copy of the Judge's decision

^{7/} The testimony of Mr. Rey quoted above was given in December, 1990 -- one month *before* Rainbow told the Commission that construction had been delayed because of some non-specified "dispute" with Rainbow's tower owner. That is, while Rainbow asserted in its January, 1991 application that the dispute with the tower owner had theretofore delayed construction, Mr. Rey had clearly admitted, one month before, that he recognized that Rainbow *could* construct at any time if it so chose.

^{8/} Indeed, in its opposition Rainbow, perhaps unwittingly, further undermined its own case. There Rainbow acknowledged that it had initiated the lawsuit (*i.e.*, the "dispute") against its tower owner on *November 2, 1990*. But Rainbow also included, as an attachment to its opposition, a memo dated *November 5, 1990* -- three days *after* the lawsuit was filed -- in which Rainbow advised the tower owner that Rainbow intended to go forward at that time with construction. In other words, Rainbow plainly recognized, from the very beginning of its "dispute" with the tower owner, that that "dispute" did *not* affect Rainbow's ability to construct. Of course, in its fifth and sixth extension applications, Rainbow told the Commission a very different story.

(which Press originally submitted to the Commission in June, 1991) is included as Attachment F hereto.^{9/}

9. Press also opposed Rainbow's sixth (June, 1991) extension application. In that opposition Press again pointed out Rainbow's repeated failure to satisfy the requirements of Section 73.3534 of the Commission's rules. Additionally, Press incorporated by reference its petition for reconsideration of the January, 1991 application (which had not theretofore been acted on).

10. In November, 1991, Rainbow filed the above-captioned application (FCC Form 316) for assignment of Rainbow's permit to a new entity which would supposedly be controlled by Rainbow's already-approved principals. According to Exhibit 1 to that application, the application proposed

a reorganization which will permit [Rainbow] to reduce its reliance on debt to complete construction and commence operation of a new UHF television station on Channel 65, Orlando, Florida by December 1992, by restructuring to admit nonvoting equity participants.

See BTCCT-911129KT, Exhibit 1. The assignment application made no other reference to construction of the station, and did not even suggest (much less specifically represent) that Rainbow's ability to construct might be contingent on favorable action on the proposed assignment.

11. Press opposed the assignment application, pointing out that the proposed assignment tended to confirm virtually all of the allegations which Press had advanced in its earlier pleadings. Rainbow responded to Press' opposition, again without substantively addressing the mounting body of factual evidence presented by Press.

12. And there matters stood for approximately 18 months. In March, 1993, the Commission wrote to Rainbow asking for a detailed report on Rainbow's efforts, since November, 1991, to construct the station. In April, 1993, Rainbow submitted its response which indicated, in effect, that

^{9/} Press encourages the Commission to review the District Court's decision. Rainbow, having initiated the suit seeking a preliminary injunction, had the burden of demonstrating to the Court how Rainbow might suffer irreparable harm. Therefore, Rainbow had both the burden *and* the opportunity to demonstrate that Rainbow in fact had engaged in serious business activities which would be severely disrupted absent an injunction. As the Court's opinion makes clear, Rainbow failed to make any such showing. The Court concluded that Rainbow had made no financing arrangements, had acquired no equipment, had in effect done nothing at all toward construction and operation of its station. Rainbow did not appeal the Court's decision.

Rainbow had done **NOTHING** in the intervening 18 months. Press submitted comments on Rainbow's response, pointing out that that response further demonstrated Rainbow's failure to comply with Section 73.3534 of the Rules, and also that that response tended to substantiate most (if not all) of Press' other allegations concerning Rainbow's lack of financial qualifications, lack of truthfulness and candor, abuse of process, and the like.

13. On June 18, 1993, the Division Chief issued her letter (Attachment B hereto) effectively granting Press' opposition to Rainbow's June, 1991 extension application, denying that application, dismissing as moot Rainbow's assignment application, and canceling Rainbow's permit. ^{10/} The Division Chief's decision was solidly grounded in the Commission's regulations and precedent.

14. On July 2, 1993, Rainbow filed a Petition for Reconsideration of the Division Chief's letter. Rather than address any supposed shortcomings of that letter, Rainbow chose to rely primarily on a variety of factual assertions and arguments which had not previously been made. Press opposed Rainbow's Petition on July 12, and Rainbow replied on July 14. On July 30 -- barely two weeks after the close of the pleading cycle, and little more than a month after the Division Chief's letter -- the Bureau Chief issued his letter reversing the Division Chief, reinstating the permit, and granting Rainbow's applications. It is that decision which is the subject of the instant Application for Review.

THE BUREAU CHIEF'S DECISION

15. With respect to extension of Rainbow's construction permit, the Bureau Chief stated *in toto* as follows:

When [Rainbow] submitted the extension and assignment applications, [it] had not yet had two years to complete construction. Thus, Rainbow should not have been required to make the showings requisite for an extension of time beyond two years, when it had, in effect, only 10 months within which to construct the station following the finality of the Commission's decision granting the permit. We believe that the requested eight months should provide

^{10/} Because the denial of Rainbow's application and cancellation of its permit rendered further inquiry into Rainbow's basic qualifications to be a licensee moot, the Division Chief properly declined to address Press' allegations concerning Rainbow's obvious lack of qualifications.

[Rainbow] with enough time to complete construction. We emphasize that this action is extremely narrow, based on our issuing a construction permit before finality.

See Attachment A, page 2. No cases were cited, no rules were cited, and no explanation was offered as to why the Division Chief's contrary decision might have been in error.

16. With respect to Press' allegation that Rainbow had lied when it twice claimed that construction had been delayed solely by a "dispute" with Rainbow's tower owner, the Bureau Chief stated *in toto* as follows:

Before Rainbow filed the extension application now before us, the court [in the litigation between Rainbow and its tower owner] denied [Rainbow's] motion for a preliminary injunction, and Rainbow then notified the tower owner of its intention to commence construction and requested that the lease provisions regarding construction bids be effectuated. Under the circumstances set forth by Rainbow, we conclude that the dispute with the WRBW(TV) tower owner was a factor, albeit not the principal one, that contributed to the delay in construction and that the cited language was, therefore, not a misstatement.

Id.

17. With respect to Press' observation that Rainbow's submissions to the Commission in 1993 amount to a concession that Rainbow has not been financially qualified for more than 18 months, the Bureau Chief stated *in toto* as follows:

We disagree [with Press]. Projected expenditures and sources of funds relied upon by applicants in establishing their financial qualifications frequently change and initial proposals are rarely carried out as planned. See *KRPL, Inc.*, 5 FCC Rcd 2823, n. 1 (1990), citing *Revision of Form 301*, 50 RR 2d 381, 382 (1981).

Id. at 2-3.

18. With respect to Press' allegations that Rainbow's course of conduct, when measured against the available incontestable documentary evidence, constituted an anti-competitive abuse of process, the Bureau Chief stated *in toto* that "[w]e find that those allegations are without merit." *Id.* at 3.

ARGUMENT**I. The Bureau Chief's Grant of Rainbow's Extension Application Was Factually and Legally Incorrect.**

19. As a threshold matter, it is important to recognize that the Bureau Chief's disposition of the narrow question concerning grant of Rainbow's extension application was factually flawed. The Bureau Chief stated that Rainbow "had not yet had two years to complete construction" at the time it filed the above-captioned applications. That is simply wrong. Rainbow's permit was issued in 1985. Thus, Rainbow had had some six years prior to the filing of its applications, and some eight years prior to the Division Chief's cancellation of the permit, in which to construct.

20. Moreover, the Bureau Chief's letter ignores the fact that, even if the finality date of Rainbow's permit were deemed somehow relevant, *Rainbow had in fact had nearly three years following finality in which to construct*. That is, all appeals concerning Rainbow's permit became final as of August 30, 1990. While Rainbow had to file extension applications thereafter, the mere filing of an extension application meant that the permit would remain in full force and effect pending disposition of that application. *See* 47 U.S.C. §307(c). Since the Bureau did not act on Rainbow's June, 1991 extension application until June, 1993, Rainbow could have built its station, or it could at least have commenced construction, or it could at the very least have made some progress in that direction, at any time during the 34-month period September, 1990 through June 18, 1993. That is, there was absolutely no restriction on building imposed by the Commission for almost three years.

21. But when the Bureau asked Rainbow in March, 1993 -- more than two and one-half years *AFTER* finality -- for a progress report on its construction efforts, Rainbow advised the Commission in effect that Rainbow had done *NOTHING* in the way of construction. Thus, it is just not right for the Bureau Chief to try to suggest, as a matter of fact, that Rainbow has lacked sufficient time in which to construct.

22. The Bureau Chief's decision in this regard is legally flawed as well. Section 73.3534 of

the Commission's Rules governs applications for extensions of construction permits. It does *not* carve out any exception for an application filed with respect to a permit issued before the decision granting the permit has become final; rather, it relates to *all* applications for permit extensions (with two minor exceptions not relevant here). ^{11/}

23. There is no question but that Rainbow was required to file an application for extension of its permit. As of August, 1990 (when the appeals relating to the grant of Rainbow's permit were concluded), Rainbow's permit bore an expiration date of January 31, 1991. With the grant (however precipitous) of Rainbow's January, 1991 extension application, that date was pushed back to August 5, 1991. Rainbow's June, 1991 extension application was intended to get that latter date extended still.

24. Under Section 73.3534 (both on its face and as applied by the full Commission in numerous cases), an applicant for an extension of a permit is required to make one of three showings. The applicant must demonstrate either that (a) construction is complete or (b) substantial progress has been made (equipment is on hand, site is acquired and cleared, construction is proceeding toward

^{11/} The Bureau Chief's terse and non-analytical "discussion" on this point is unilluminating. The Bureau Chief seems to be taking the position that the two-year construction period does not commence until the grant of the permit becomes final. But that notion -- which is not supported by any rule, policy or precedent of which Press is aware -- is directly contradicted in several ways by the Commission's (or, more accurately, the Bureau's) historical treatment of Rainbow. Here, rather than withhold Rainbow's permit pending finality, the Bureau issued that permit with a two-year expiration date. Certainly the Bureau must have known of the on-going appellate litigation (the Commission was, after all, a party to that litigation); if the pendency of that litigation meant that the two-year construction clock had not started ticking, then the Bureau would not have issued the permit.

Further, Rainbow sought, and the Bureau granted, four separate six-month extensions of the initial two-year construction period based on Rainbow's claim of non-finality. Again, if non-finality stayed the effectiveness of the construction permit or somehow automatically re-set the two-year clock, the Bureau had four separate opportunities in which to so state. It never did; instead, it extended the permit for six-month periods, as is the Bureau's standard operating procedure.

And perhaps the most effective answer to the Bureau Chief's conclusory notion is the fact that even if the Bureau Chief is, *arguendo*, correct and each permittee is entitled to a two-year construction period post-finality, Rainbow had a post-finality construction period of *nearly three years*. (See text above.) That is, Rainbow was afforded a *de facto* (and, in light of Section 307(c) of the Communications Act, *de jure*) extension by virtue of the fact that the Bureau did not act on its sixth extension application (filed in June, 1991) for some two years. Despite that, Rainbow acknowledged in April, 1993 that it had made zero progress toward construction in the preceding 18 months or more. Thus, the Bureau Chief's terse and conclusory suggestion that Rainbow had not been given a full opportunity to construct is legally and factually unsupported.

completion), or (c) no progress has been made due to circumstances clearly beyond the permittee's control. *E.g.*, *Community Service Telecasters, Inc.*, 6 FCC Rcd 6026 (1991); *Panavideo Broadcasting, Inc.*, 6 FCC Rcd 5260 (1991); *Golden Eagle Communications, Inc.*, 6 FCC Rcd 5127 (1991); *High Point Community Television, Inc.*, 2 FCC Rcd 2506 (1987); *Metrovision, Inc.*, 3 FCC Rcd 598 (Video Services Division 1988). As the full Commission held in *Golden Eagle*,

[t]he *only* bases for grant of an extension where construction has not been completed or testing is not underway are *substantial and sustained progress* or circumstances beyond the permittee's control that *prevented* the construction.

Golden Eagle, supra, 6 FCC Rcd at 5129, ¶10 (emphasis added). The Commission clearly expects construction efforts to be diligent and on-going, and a permittee is not allowed to begin some preliminary construction-related projects early in the process and then simply to sit back and obtain extensions *ad infinitum* on the basis of those initial efforts. *E.g.*, *Golden Eagle, supra*, 6 FCC Rcd at 5129, ¶10. ^{12/}

25. Let's look at what Rainbow advised the Commission, in its June, 1991 application, concerning its construction efforts during the January-June, 1991 extension period. Needless to say, Rainbow could not -- and did not -- claim that construction had been completed. Similarly, Rainbow could not -- and did not -- point to any substantial construction. The only "progress" it reported was that it had notified the tower owner of its intention to proceed with construction, that it had "initiated discussions with equipment manufacturers" and that it "intend[ed] to place its equipment order as soon as the building construction schedule is finalized." *See* Attachment D hereto. ^{13/} This cannot be

^{12/} In *Golden Eagle*, the full Commission stated that "a permittee's extension application will be judged according to the progress made during the most recent construction period. If this were not so, a permittee would partially construct a station and then obtain extensions indefinitely, based on that initial construction. Such a result would be contrary to . . . our policies." 6 FCC Rcd at 5129, ¶10.

^{13/} In November, 1991, five months after the June, 1991 application, Rainbow supplemented that application to indicate that its transmitter building had been constructed. However, as Press has previously advised the Commission, that building was actually built to accommodate Press' co-located transmitter as well as Rainbow's. Since Press (unlike Rainbow) constructed its authorized facilities at that site, Press had to make arrangements for a transmitter building. Accordingly, in cooperation with the tower owner, Press caused the transmitter building to

(continued...)

seen as substantial progress by any means, since it reflects, in effect, no progress at all. The Commission expects Rainbow to have done more than send a memo to the tower owner and "initiate discussions with equipment manufacturers". ^{14/}

26. Since no substantial progress had been demonstrated, that left only the "circumstances beyond the permittee's control" element of Section 73.3534 for Rainbow to fall back on. In that regard Rainbow alleged in its application only that "[a]ctual construction ha[d] been delayed by a dispute with the tower owner".

27. But that was not a circumstance beyond Rainbow's control which prevented it from building. Indeed, in the lawsuit in question, Rainbow's own principal had testified that he knew he *COULD* construct at any time; the decision not to construct was thus a purely voluntary one on Rainbow's part. That was further demonstrated by the November 5, 1990 memo from Rainbow to the tower owner. *See* Footnote 8, *supra*. And it was still further demonstrated by the fact that, when Rainbow's effort to obtain a preliminary injunction was denied in June, 1991, Rainbow announced that it intended to proceed immediately with construction, proving conclusively that Rainbow *knew* that the lack of a preliminary injunction was not a bar to construction. As a result, Rainbow could *not* legitimately claim that it had been prevented from constructing by circumstances beyond its control. To the contrary, the entire "dispute" relied upon by Rainbow was a matter which was

^{13/}(...continued)

be built on a schedule which would permit Press to complete installation and commence operation within approximately four months of the District Court's decision. (And the Commission's records will reflect that Press did in fact meet that schedule, commencing operation from that site in the first week of October, 1991.) The transmitter building was designed with sufficient space for both Press' and Rainbow's transmitters. However, that portion of the space reserved for Rainbow was apparently still vacant in July, 1993 and, as Rainbow itself admitted in its July, 1993 Petition for Reconsideration (at n. 10), Rainbow had not even bothered to install electrical power to its portion of the building as of then.

^{14/} History demonstrated that neither the supposed "initiat[ion] [of] discussions with equipment manufacturers" nor the notification to the tower owner of Rainbow's supposed willingness to proceed was a reliable indicator of any intent actually to construct. Rainbow admitted, *nearly two years later*, that it *STILL* had not even selected, much less ordered, any equipment as of April, 1993. And, in relying on its supposed notification to the tower owner in June, 1991, Rainbow seems to have forgotten that it had *already* notified the tower owner of its willingness to proceed -- in November, 1990! *See* footnote 8, *supra*.

entirely WITHIN Rainbow's control.

28. But that "dispute" was the *only* circumstance cited by Rainbow in its application. Because of that, the Division Chief was absolutely correct in her finding that Rainbow had made a deliberate, voluntary business judgment not to construct during the relevant extension term: Rainbow thus failed to satisfy any of the three criteria set out in Section 73.3534, and Rainbow's application should have been denied. ^{15/} The Bureau Chief's failure even to address this crucial question fatally undermines his reversal of the Division Chief's decision.

II. The Bureau Chief's Conclusory and Unsupported Refusal to Consider the Substantial and Material Questions Which Exist With Respect to Rainbow's Basic Qualifications Was Inconsistent With Well-Established Statutory and Administrative Standards Which Require the Designation of Those Questions for Hearing.

29. Even if the Commission were inclined to ignore the overwhelming weight of precedent and policy supporting denial of Rainbow's extension application, Rainbow's applications could still not be granted without a full evidentiary hearing into the many serious questions which Rainbow's conduct has plainly raised. When such questions are raised, the Commission has a *statutory* duty to resolve those questions before grant. *E.g.*, 47 U.S.C. §309(e); *Astroline Communications Company Limited Partnership v. FCC*, 857 F.2d 1556 (D.C. Cir. 1988); *David Ortiz Radio Corp. v. FCC*, 941 F.2d 1253 (D.C. Cir. 1991); *Weyburn Broadcasting Limited Partnership v. FCC*, No. 91-1378, 71 R.R.2d 1386 (D.C. Cir. 1993). Here, Rainbow's various representations and machinations raise substantial and material questions about its truthfulness and candor before the Commission, its

^{15/} That finding was also amply supported by the sworn statements of Rainbow and its representatives made in the lawsuit against the tower owner. For example, in its complaint in that lawsuit, Rainbow (over Mr. Rey's signature) stated that Rainbow "is now prepared . . . to commence construction However, [Rainbow's] permit for Channel 65 . . . is not a viable business opportunity if, in fact, [the tower owner] is permitted to place additional TV antennas" at the top of the tower. The clear import of this (and the rest of Rainbow's suit) is that Rainbow *elected* not to construct in order to avoid a potentially undesirable competitive environment. But it is well-established that the avoidance of competition is not a valid justification for failure to construct. *E.g.*, *New Orleans Channel 20, Inc.*, 100 FCC2d 1401 (Mass Media Bureau 1985), *application for review denied*, 104 FCC2d 304, 313 (1986), *aff'd sub nom. New Orleans Channel 20, Inc. v. FCC*, 830 F.2d 361 (D.C. Cir. 1987); *Community Service Telecasters, Inc.*, *supra*; *Panavideo Broadcasting, Inc.*, *supra*.

financial qualifications, and its willingness to abuse the administrative and judicial processes, at a minimum.

30. *Misrepresentation/Lack of Candor.* In its two extension applications filed in 1991, Rainbow represented that its "actual construction ha[d] been delayed by a dispute with the tower owner". As discussed above, that was a demonstrably false representation: the "dispute" could not accurately be said to have delayed construction in any meaningful way. There is clear evidence that Rainbow knew in 1990 and 1991 that that statement was false ^{16/}, and in its 1993 pleadings Rainbow itself appears to have flatly contradicted its own earlier statement. ^{17/}

31. By the same token, Rainbow has repeatedly represented to the Commission that it is "ready, willing and able" to construct. *See, e.g.*, Attachment C hereto (Rainbow's January, 1991 extension application). But in its 1993 Petition for Reconsideration Rainbow flatly contradicted *that* statement, saying instead that Rainbow is -- for some reason which Rainbow has been understandably reluctant to disclose -- "unable" to construct. And separate and apart from Rainbow's own conflicting statements, the record of Rainbow's inaction confirms Rainbow's apparent inability. After all, Rainbow has had its permit for almost three years following the conclusion of all judicial appeals. And yet it has done virtually *nothing* to construct its station.

32. In a related vein, in each of Rainbow's extension applications Rainbow represented that all the statements contained in its original construction permit application remained accurate. In view of Rainbow's apparent lack of financial qualifications (see below), those statements appear to be false as well.

33. There are, therefore, extraordinarily clear indications that Rainbow has repeatedly lied to the Commission. Rainbow, of course, had ample opportunities over the last 30 months to address

^{16/} *See, e.g.*, Footnotes 7 and 8 and Paragraph 6, *supra*.

^{17/} *See, e.g.*, Rainbow Petition for Reconsideration at 6 ("Rainbow's dispute with the tower owner did not materially delay construction.")

those indications and to explain why they don't constitute misrepresentation. Rainbow elected not to do so. As a result, substantial and material questions concerning Rainbow's truthfulness and candor exist, and a hearing would be necessary before Rainbow could properly be granted any authorization.

34. The Bureau Chief's disposition of the misrepresentation question is difficult to fathom in light of the uncontroverted and incontrovertible documentary evidence. The totality of the Bureau Chief's "discussion" of that question is:

Under the circumstances set forth by Rainbow, we conclude that the dispute with the WRBW(TV) tower owner was a factor, albeit not the principal one, that contributed to the delay in construction and that the cited language was, therefore, not a misstatement.

See Attachment A. There are at least two serious problems with this position. First, it is clear from multiple statements made by Rainbow itself (including the sworn testimony of Mr. Rey in December, 1990) that the "dispute" was *not* a bar to construction; the Bureau Chief's unexplained and inexplicable suggestion that the dispute somehow "contributed to the delay" is pure fiction unsupported by *any* evidence of any sort whatsoever. Second, while the Bureau Chief suggests that there might have been some other factor contributing to Rainbow's failure to construct, not even Rainbow suggested the existence of any such other factor in its applications. Rather, the *SOLE* basis on which Rainbow sought its extension was the supposed "dispute". The Bureau Chief's fanciful reference to some other possible factor underlying Rainbow's failure to construct is completely unsupported by the record.

35. The Bureau Chief's perfunctory "discussion" thus fails totally to address, much less resolve, the substantial and material question raised by Rainbow's apparent misrepresentations. Accordingly, the Bureau Chief's decision should be reversed.

36. *Financial Qualifications.* Press thinks it is painfully obvious, from the facts and circumstances which are a matter of record, that Rainbow is not now financially qualified and has not been financially qualified for some time, probably at least since January, 1991. Notwithstanding Rainbow's explicit assertions that it is "ready, willing and able" to construct, the fact is that Rainbow

has *NOT* constructed, and that Rainbow has told the Commission that it is *UNABLE* to construct absent some reorganization apparently designed to infuse new cash into Rainbow. It is hard to imagine a clearer admission of financial inability. ^{18/}

37. Further aggravating Rainbow's problem is the fact that Rainbow had apparently not even selected equipment until *after* its permit was canceled in June, 1993. How could Rainbow have hoped to make the necessary arrangements for financing if it did not know what it would be acquiring in the way of equipment? ^{19/}

38. Rainbow had ample opportunity to demonstrate its financial qualifications. It consistently failed to do so. To the contrary, it stated quite plainly that it is "unable" to construct absent its proposed "reorganization", and it acknowledged that the sole purpose of that "reorganization" would be to permit the infusion of new capital. The only possible conclusion which one can legitimately draw from this is that Rainbow is not now (and apparently has not been for some time) financially qualified.

39. The Bureau Chief offers yet another perfunctory, off-the-point response to these questions. He states simply that

Projected expenditures and sources of funds relied upon by applicants in establishing their financial qualifications frequently change and initial proposals are rarely carried out as

^{18/} There are other clear indications of the non-existence of Rainbow's financial qualifications discussed in Press' Opposition to Rainbow's Petition for Reconsideration and incorporated herein by reference. But the Commission doesn't need to take Press' word on the question of Rainbow's lack of financing; the Commission can review the District Court's opinion in Rainbow's own litigation (included as Attachment F hereto). After considering all of the evidence proffered by Rainbow in support of its request for a preliminary injunction, the Court concluded that, *inter alia*, "there is no convincing proof that Rainbow actually has financial backing". Attachment F, page 14.

^{19/} And even Rainbow's post-cancellation equipment list, tendered with its Petition for Reconsideration in July, 1993, raises questions. A cursory review of that list does not reveal any antenna line/wave guide (or associated hardware) with which to connect the transmitter to the antenna. It reveals no auxiliary generator, no air conditioning (or associated ductwork) for the transmitter site, no studio space. It does not appear to include any provision for installation of *any* of the equipment, including mounting of the antenna and connection of the antenna to the transmitter. Oddly, the equipment which Rainbow *did* list totals more than \$1.5 million, and Rainbow's supposed "equipment loan agreement" would provide only \$2 million. The relative slimness of the cushion and the contrasting extensiveness of obviously omitted items from Rainbow's list raises questions as to the adequacy of the supposed \$2 million.

planned. *See KRPL, Inc.*, 5 FCC Rcd 2823, n. 1 (1990), citing *Revision of Form 301*, 50 RR 2d 381, 381 (1981).

See Attachment A. But in *KRPL, Inc.*, the Commission clearly indicated that no question had been raised there about the applicant's "current financial condition"; rather, a petitioner had claimed, based on a passing reference in a newspaper article, that the permittee might be seeking alternate financing. 5 FCC Rcd at 2824, n. 1. The fact that the applicant *might* be considering alternative financing arrangements was deemed immaterial because the Commission could assume -- absent any contrary indications -- that the applicant's initial financing plan was still in place and available. This is consistent with Commission policies which permit an applicant for a permit to rely on alternative financing arrangements *as long as its original financing arrangements remain in place*. *See, e.g., Texas Communications Limited Partnership*, 6 FCC Rcd 5191 (1991), *recon. denied*, 7 FCC Rcd 3186 (1992).

40. Here, by contrast, Rainbow has expressly admitted that, absent some reorganization and infusion of new equity capital, it is "unable" to construct. That is, Rainbow itself has *admitted* that, at least for the period 1991-1993, it has *not* been qualified to construct and operate. ^{20/}

41. This squarely raises several basic qualifying issues. First, it demonstrates further misrepresentations by Rainbow. Recall that Rainbow has repeatedly, explicitly and expressly advised the Commission that Rainbow has consistently been "ready, willing and able" to construct. But in 1993 Rainbow it has admitted that that is not the case, and that that has apparently not been the case since at least November, 1991. Rainbow's latter-day admission cannot be squared with its earlier statements -- clearly, Rainbow has lied about its financial qualifications and its ability to construct.

42. Second, and perhaps even more obviously, Rainbow's admission of inability to construct

^{20/} The Bureau Chief's facile citation of *KRPL, Inc.* is thus unavailing here, as that case is factually distinct from Rainbow's situation. Rather, the instant case is more analogous to *High Point Community Television, Inc.*, *supra*, where the full Commission denied an extension based on the permittee's claimed need to seek new financing. Of course, the Division Chief cited *High Point* in her decision denying Rainbow's extension application. Inexplicably, the Bureau Chief does not even mention that case, much less offer an explanation as to why it does not control here.

constitutes nothing less than an admission that it is not now financially qualified, and that it has not been financially qualified for some time. The fact that Rainbow may think that it can correct that situation through some assignment or transfer of its permit is immaterial. *E.g., High Point, supra*. Clearly, Rainbow lacks basic financial qualifications, and the Bureau Chief's attempt to gloss over that basic disqualifying status is inconsistent with Section 309 of the Communications Act and ample Commission precedent and must, therefore, be reversed.

43. *Abuse of Process*. Rainbow's overall course of conduct in this matter has constituted an abuse of the Commission's processes, a transparent attempt to withhold and dissemble in an effort to keep its construction permit alive. Press encourages the Commission to review critically all of Rainbow's submissions since January, 1991. Press submits that such a review will demonstrate that Rainbow has consistently sought to avoid at all costs any direct explanation or description of its situation. Instead, Rainbow has alleged delays arising from a "dispute" which Rainbow knew full well did not cause any delay. And when that was plainly established by Press, Rainbow simply said nothing. Similarly, when Press urged that Rainbow lacked financial qualifications, Rainbow declined to offer any meaningful response, only to effectively admit, two years later, that Press was right all along. This is clearly the stuff of abuse of process.

44. Further, while Rainbow was completely inactive as far as its own construction permit was concerned, it was engaged in an aggressive series of maneuvers designed to prevent Press from establishing its own operation on Channel 18 in the Orlando area. As the Commission is aware, Rainbow fought Press' channel swap every step of the way, all the way to the Court of Appeals. *Rainbow Broadcasting Company v. FCC*, 949 F.2d 405 (D.C. Cir. 1991). A core argument advanced by Rainbow throughout that more-than-two-year effort was the notion that Press did not have reasonable assurance of its proposed transmitter site. But in its own litigation against the tower owner, Rainbow expressly admitted that Press *did* have such reasonable assurance -- indeed, the reason Rainbow sought judicial intervention was that, as Rainbow recognized, without such

intervention Press could and would proceed with construction. ^{21/} Rainbow's overall course of conduct, including its efforts to block Press' use of the tower, constitutes yet another gross abuse of the processes of both the Commission and the courts.

45. All of the foregoing was before the Bureau Chief for consideration. His treatment of these matters consists of a single eight-word sentence: "We find that those allegations are without merit." Such a response is plainly inadequate in the face of the uncontested evidence. Accordingly, the Bureau Chief's decision in this regard should be reversed.

CONCLUSION

46. The Commission has -- both historically and, even more aggressively, in recent years -- strongly adhered to the policy that construction permits will not be extended unless the criteria in Section 73.3534 are satisfied. *E.g., Community Service Telecasters, Inc., supra; Panavideo Broadcasting, Inc., supra; Golden Eagle Communications, Inc., supra; High Point Community*

^{21/} Rainbow's claim that Press did not have reasonable assurance appears to have been based largely on Rainbow's own assertion that Rainbow had some exclusive claim to that portion of the tower which Press proposed to use. The trouble with Rainbow's assertion is that, as the District Court concluded in the tower litigation, no such exclusivity had even been bargained for. In the Court's words,

[Rainbow's] lease by its terms *plainly* and *unambiguously* provides Rainbow *only* with "*non-exclusive*" use of the top television antenna space. . . . We do *not* believe that the parties to this contract bargained for Rainbow's "exclusive" use of the top television antenna space on Gannett's Bithlo Tower. The contract *specifically* provides for "*non-exclusive*" use, and, we find that *no one* at Gannett *ever* represented to Rainbow that it would enjoy "exclusive" use of the top of the Tower.

* * *

[T]he *plain language* of the agreement of lease does *not* grant [Rainbow] "exclusive" use of the top television antenna space. . . . The Lease may "fairly" be interpreted in *only one way*. Its terms are *unambiguous* and its meaning *plain*. . . . [T]he agreement specifically does *not* grant "exclusive" use of the top slot of the Bithlo Tower. . . . [The tower owner] *never* promised [Rainbow] "exclusive" use of the Tower, *nor did the parties bargain for "exclusive" use*.

. . . [T]he Lease was a product bargained for at arms length by attorneys who were aware of the Lease's provisions regarding non-exclusivity. In fact, [Rainbow's] attorney . . . could not testify that the issue of "exclusivity" was even addressed during negotiations. [He] specifically stated that all he understood was that he was to bargain for the "top slot". He did not recall that "exclusivity" was discussed and admitted that he did not object to the explicit provision contained in the Lease stating that the "leased premises" were leased on a "non-exclusive" basis.

See Attachment F at 3, 9-10, 12 (emphasis added).

Television, Inc., supra. The Court of Appeals has -- both historically and, even more aggressively, in recent years -- mandated that the Commission comply with the requirements of Section 309 of the Communications Act. *E.g., Astroline Communications Company Limited Partnership v. FCC*, 857 F.2d 1556 (D.C. Cir. 1988); *David Ortiz Radio Corp. v. FCC*, 941 F.2d 1253 (D.C. Cir. 1991); *Weyburn Broadcasting Limited Partnership v. FCC*, No. 91-1378, 71 R.R.2d 1386 (D.C. Cir. 1993). The Bureau Chief's decision below runs afoul of both of these two lines of authority.

47. Objective review of the available evidence, most of which has been provided by Rainbow itself, demonstrates that, if Rainbow's express claims in 1991 that it was "ready, willing and able" to construct are to be believed, then Rainbow has voluntarily declined to construct its station. Under Section 73.3534, then, no extension of Rainbow's permit is warranted, and the permit should be canceled. Of course, if Rainbow's 1991 "ready, willing and able" claims were not true, then Rainbow was not qualified to remain a permittee, and the permit should have been canceled in any event.

48. Objective review of the available evidence also demonstrates that, rather than admit the voluntariness of its failure to construct, Rainbow has chosen to dissemble repeatedly. It blamed a "dispute" with its tower owner, even though, at the time it was telling that to the Commission, Rainbow was telling a contradictory story in the District Court in Florida. Rainbow also repeatedly advised the Commission that Rainbow was "ready, willing and able" to construct, even though, as Rainbow finally admitted to the Commission in 1993, Rainbow is in fact "unable" to construct absent some financial reorganization.^{22/} There is thus clear uncontroverted evidence before the


^{22/} On this latter claim, the Commission should be sure to focus on the chronology of Rainbow's claims. Through 1991, Rainbow was taking the position that it was fully qualified to construct. Even when Press opposed Rainbow's November, 1991 assignment application, arguing *inter alia* that that application demonstrated Rainbow's lack of financial qualifications, Rainbow consistently pooh-poohed Press' arguments. At no time in connection with its November, 1991 assignment application (either in the application itself or the pleadings related to it) did Rainbow even suggest, much less specifically advise the Commission, that absent a grant of that application, Rainbow would be "unable" to construct. Rainbow did not change its tune on this score until April, 1993.

Commission that Rainbow has lied to the Commission, that Rainbow is not financially qualified, and that Rainbow has engaged in abuse of administrative and judicial processes.

49. Under these circumstances, and in light of the well-established rules, policies and precedent cited above, the Bureau Chief's action below -- which is not supported by any authority and which, indeed, is not even supported by the available facts -- cannot stand. That decision should be reversed.

WHEREFORE, for the reasons stated, Press Broadcasting Company, Inc. submits that the decision of the Chief, Mass Media Bureau discussed above should be reversed, the above-captioned application for extension of construction permit should be denied, the above-captioned application assignment of construction permit should be dismissed as moot, and the construction permit of Station WRBW(TV) should be canceled.

Respectfully submitted,


/s/ Harry F. Cole
Harry F. Cole

1901 L Street, N.W.
Suite 250
Washington, D.C. 20036
(202) 833-4190

Counsel for Press Broadcasting Company, Inc.

August 26, 1993